

## **MINUTES**

### **KENTUCKY WORKERS' COMPENSATION REGULATORY ADVISORY COMMITTEE**

**September 22, 2022**

A meeting of the Regulatory Advisory Committee (RAC) was held on September 22, 2022, beginning at 1:30 p.m. in the Hearing Room at the Department of Workers' Claims, 500 Mero Street, Frankfort, Kentucky, regarding preliminary comments on potential revisions to 803 KAR 25:010.

Members present in-person: From the Kentucky Department of Workers' Claims (DWC) were Douglas Gott, Chief Administrative Law Judge; Stephanie Kinney, Administrative Law Judge; Dale Hamblin, Assistant General Counsel; Michael Alvey, Chairman, Kentucky Workers' Compensation Board. Other members present were Kenneth J. Dietz, Kelly Gray, Bobby Ferreri, and Robert Swisher.

Members present via Zoom were John Coleman, Administrative Law Judge; Mark Knight, Gerald Vanover, Jeff Roberts, and Ched Jennings.

Also in attendance was Scott Wilhoit, Commissioner of the Kentucky Department of Workers' Claims, who welcomed everyone to the meeting. The Commissioner noted that the meeting is held in accordance with KRS 61.823(4)(a), the Open Meetings statute, and that notice of the meeting was published as required. He thanked all the members for participating.

The members of the committee introduced themselves. Judge Gott also addressed the group and thanked everyone for giving their time and his appreciation for the productive discussion of the regulation language that may needed to be changed.

Judge Gott picked up from the end of the last meeting to begin discussions at Section 7, and asked if "voluntary intoxication" language should be deleted in light of new KRS 342.610 (3). There was mention of the notice of disclosure in subsection (2)(3), the discussion continued on that point. noting there is Notice of Discovery. Mr. Swisher suggested Notice of Disclosure by both parties at the end of an approved time, 45 days. Mr. Ferreri agreed with Mr. Swisher. Mr. Jennings asked how much disclosure helps or if it is even referred to by the parties and ALJs. Judge Coleman stated that it is probably more beneficial to the other party than to the judges, while Judge Kinney said she referred to the disclosure in preparing for a BRC. Mr. Jennings stated that he hasn't really done many of them and suggested dropping the requirement if it is not needed. Commissioner Wilhoit said that he liked the requirement when he was practicing because he wasn't "blindsided" by opposing counsel. Ms. Gray said there is value in the witness list and that a date by which it is due would be beneficial. Ms. Gray also stated that by the time of a BRC, everyone should know what is coming, to which Mr. Ferreri

agreed. Judge Gott noted that the consensus seems to be that the disclosure date is too quick, and that the committee had given the Commissioner ample points of view to consider.

Judge Gott then turned the discussion to subsections (2)(e)(7) & (8), and whether amendments were necessary in light of the Wonderfoil case. Mr. Swisher stated he thought the regulation should be unchanged. Mr. Jennings said that the requirements related to providing medical bills was a malpractice trap. Mr. Hamblin thought a clarification would be appropriate. Mr. Swisher agreed that a reasonable settlement can't be reached if unknown bills exist. Mr. Knight stated that it is practically impossible for Plaintiff attorneys to get the bills other than through a subpoena. Therefore, trying to get them and file them within 45 days is difficult. Judge Coleman asked if plaintiff can just list places of medical services so that all parties know there may be outstanding expenses.

Mr. Alvey stated the existing regulation was adopted after the Roach decision and that it doesn't require anyone to gather what they don't have. It only clarifies that you give you what is in your possession. Mr. Roberts said a deposition should reveal all medical providers, but he never knows what bills have been paid by the insurance company because he doesn't get any denials unless he has filed a subpoena. Judge Gott again noted that consensus on this issue was not likely, but the members had provided the Commissioner sufficient perspective to permit him to decide whether to amend this subsection. Commissioner Wilhoit spoke up to add that he understands the Wonderfoil decision is a concern for both sides and asked the group to send comments to him.

The discussion turned to getting information from the treating physician and the use of subpoenas. Mr. Jennings asked when a subpoena is proper when requesting medical records and that 101 needs changes. Ms. Gray and Mr. Ferreri said defense attorneys know from experience which providers will not timely provide records, if at all. Mr. Jennings stated concern about the need to be careful with subpoenas and the impact they have on injured workers.

The discussion then turned to Section 8, Discovery. Judge Gott asked if stakeholders are still satisfied with the 60-30-15 proof schedule noting that there are hearing sites that they know half of the claims will not be ready for a BRC because proof hasn't been received. Mr. Roberts said that he understands cases are going to get moved off-docket as long as the parties are trying to move the case forward. He worries that if changes are made it will prolong benefits to his clients so he would like to keep the schedule.

Judge Gott noted that Zoom has helped because parties no longer have to worry about the delay in judges returning to a particular hearing location. Mr. Jennings agreed that Judges are doing much better since Zoom and he can often get a Judge on a hearing within a couple of days, adding that it is usually medical staff that cause the delays. Several comments were made affirming the present 60-3-15 proof schedule.

The discussion then turned to Section 10, Medical Reports. Judge Gott asked for the group's help in reminding the groups they represent of the requirement to index table of

contents for records in excess of twenty (20) pages. Mr. Roberts brought up subsection 1), and recommended the two doctor limit apply to body parts and now the claim as a whole.

Turning to Section 11, Medical Evaluations, Judge Gott recognized that there are several problems with the university evaluation process. The Commissioner noted that DWC is trying to increase physician availability.

Next was a discussion on Section 12, Interlocutory Relief. Judge Gott noted that most everyone is dissatisfied with the present procedure for referring a MIR for a decision by a different ALJ from the one assigned by the scheduling order. Further, the ability to conduct hearings by Zoom has negated one of the reasons for that referral procedure – to allow an ALJ in proximity to the claimant to schedule a prompt hearing at his or her nearby hearing site. There was related discussion on whether to get rid of the label “interlocutory relief,” and instead allow parties to pursue something akin to “expedited relief.” Judge Gott suggested to just let the Judges deal with as they see fit and keep the label.

The next section was 13, Benefit Review Conferences. Judge Gott noted that BRCs have been largely telephonic over the last two years because of Covid. There is a strong sentiment with some to keep BRCs in-person because of the benefits of face-to-face interaction but wondered if the success and efficiency of Zoom has made returning to in-person BRCs unlikely. Mr. Vanover and Mr. Dietz agreed with the efficiency of the virtual BRCs, but Mr. Dietz and Mr. Ferreri commented on the loss of the experience for young attorneys in observing and learning from experienced attorneys. Mr. Jennings said that he thinks the practice we have today is the better system. He said that it’s more efficient for the judges and that it’s better for injured workers not having to drive to hearing sites that aren’t close to where they are. Judge Coleman expressed concern over connectivity of Zoom, bringing attention to some of those issues experienced today by those who are not in-person. The conversation veered toward hearings, which is a separate section, and Mr. Dietz noted that a live hearing is still often in the employer’s best interest particularly if it is a high exposure case; judges shouldn’t have to decide those cases by only seeing a claimant in a small box on a screen.

At the end of two hours discussion, the meeting came to a close. Judge Gott said the remaining sections would be discussed at a final meeting. He asked members to look at the forms incorporated by Section 30.

Commissioner Wilhoit closed by telling the group he was aware of how poor the website is. He said DWC is working to fix that. He asked for continued comment on the practice reg that is the subject of these informal hearings. The meeting was adjourned at 4:00 p.m. The next scheduled meeting will be on November 2, 2022, at 1:00 p.m.